

FILED BY CLERK

APR -9 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0361-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
GILBERT R. LOAIZA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31286

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Gilbert R. Loaiza

Florence  
In Propria Persona

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B R A M M E R, Judge.

¶1 Petitioner Gilbert R. Loaiza challenges the trial court's summary denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We

will not disturb the court's ruling absent an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Finding none, we deny relief.

¶2 In 1990, pursuant to a plea agreement, Loaiza was convicted of child molestation and sentenced to an enhanced, aggravated prison term of eighteen years. This court affirmed his conviction and sentence in a consolidated appeal involving this conviction and the trial court's ruling in a probation revocation proceeding concerning an earlier conviction for having failed to register as a sex offender. *State v. Loaiza*, Nos. 2 CA-CR 90-0625, 2 CA-CR 90-0734 (consolidated) (memorandum decision filed June 23, 1992). Loaiza filed the notice of post-conviction relief at issue here in January 2009.<sup>1</sup> Advisory counsel filed a notice in lieu of a petition for post-conviction relief, stating that Loaiza intended his notice to "be considered his *pro se* petition for post-conviction relief." In his notice of post-conviction relief, Loaiza raised the following claims: (1) his sentence was aggravated illegally "based on facts which had never been found by a jury and were not proven beyond a reasonable doubt [and] were not contained in the factual basis for a guilty plea"; (2) his right to "cross-examine the witnesses against him and documents prepared for court" had been violated; (3) his sentence had been enhanced illegally and resulted from selective prosecution; (4) his due process rights had been

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<sup>1</sup>It is not clear whether Loaiza had filed a previous Rule 32 petition or petitions. In his notice of post-conviction relief, he checked a box stating he had pursued a previous Rule 32, stated his previous Rule 32 counsel was "unknown" and filled out a portion of the notice form that states the petitioner should only respond to that section "if this is an untimely notice or the defendant has filed a previous Rule 32 petition in this case." We have found nothing else in the record suggesting Loaiza ever filed a petition for review of the trial court's actions in any previous post-conviction proceeding.

violated by the state's alleged failure to disclose evidence; and (5) trial counsel had rendered ineffective assistance. The trial court summarily denied relief, finding Loaiza had "raised no colorable claims for relief and no purpose would be served by further proceedings." *See* Ariz. R. Crim. P. 32.6(c). He raises essentially the same claims on review.

¶3 Rules 32.2(a)(2) and (3) provide that "[a] defendant shall be precluded from relief under this rule based upon any ground" that has been "[f]inally adjudicated on the merits on appeal or in any previous collateral proceeding" or "has been waived at trial, on appeal, or in any previous collateral proceeding." Loaiza's first four claims are precluded because they either previously have been finally adjudicated or have been waived, either by his plea of guilty or by his failure to raise the issues on appeal. To the extent Loaiza has attempted to raise a claim based on newly discovered evidence pursuant to Rule 32.1(e), which is excepted from the rule of preclusion, he has not specified what that evidence might be, nor has he "set forth the reasons for not raising the claim in [his] previous petition" or petitions. Ariz. R. Crim. P. 32.2(b) ("If the specific exception and meritorious reasons do not appear substantiating" a claim raised under Rule 32.1(e) "and indicating why the claim was not stated in the previous petition . . . the notice shall be summarily dismissed."). To the extent Loaiza has attempted to assert he is entitled to relief based on a significant change in the law pursuant to Rule 32.1(g), based on *Blakely v. Washington*, 542 U.S. 296 (2004), *Blakely* is not retroactive and applies only to "convictions not yet final on direct review the day *Blakely* was decided." *State v. Ward*, 211 Ariz. 158, ¶ 10, 118 P.3d 1122, 1126 (App. 2005). Loaiza's 1990 conviction was

final well before *Blakely* was decided in 2004. *See State v. Febles*, 210 Ariz. 589, ¶ 9, 115 P.3d 629, 632 (App. 2005) (“A conviction is final when ‘a judgment of conviction has rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.’”), *quoting State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003).

¶4 Assuming, however, that Loaiza has not filed a previous petition for post-conviction relief, his claim of ineffective assistance of counsel is not precluded because that claim cannot be raised on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). “To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel,” a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists), 32.8(a) (defendant entitled to hearing if material issue remains). A colorable claim is “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 The trial court concluded Loaiza’s claim of ineffective assistance was meritless because he “offer[ed] no support for it.” We agree. As we understand his

argument, both in the trial court and on review, Loaiza asserts his counsel was ineffective because counsel did not advise him correctly what sentence he could face if he were to plead guilty. An attorney's failure to give accurate advice or information necessary to allow a defendant to make an informed decision whether to accept a plea agreement constitutes deficient performance. *See State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000). But Loaiza does not state what sentence his counsel informed him he might receive, much less explain how that information was incorrect. He has filed no supporting affidavit and nothing in the record supports his claim. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). He therefore has failed to raise a colorable claim of ineffective assistance of counsel, and the court did not err in rejecting it.

¶6 For the reasons stated, we find no abuse of discretion in the trial court's summary denial of post-conviction relief. Although we grant Loaiza's petition for review, we deny relief.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Judge